

STATE OF MICHIGAN  
IN THE SUPREME COURT

ECHELON HOMES, LLC,

SC: 125995

Plaintiff/Counter-Defendant/Appellee,

v.

Docket Nos. 125994 & 125995

Court of Appeals No. 243112

CARTER LUMBER COMPANY,

Defendant/Counter-Plaintiff/Appellant,

and

ECHELON HOMES, LLC,

Court of Appeals No. 243180

Plaintiff/Counter-Defendant,

v.

Trial Court No. 01-029345-CZ

Oakland County Circuit Court

Judge Eugene Schnelz

CARTER LUMBER COMPANY,

Defendant/Counter-Plaintiff.

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125994-5  
**APPELLEE ECHELON HOMES' SUPPLEMENTAL BRIEF  
OPPOSING APPLICATION FOR LEAVE TO APPEAL  
RE: CONSTRUCTIVE KNOWLEDGE**

**ORAL ARGUMENT REQUESTED**

**PROOF OF SERVICE**

**FILED**

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**STATEMENT OF QUESTION INVOLVED**

1. Whether constructive knowledge may be used to establish liability for aiding and abetting conversion under MCL 600.2919a?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

## ARGUMENT

### I. **Constructive Knowledge May Be Used To Establish The “Knowledge” Element of MCL 600.2919a**

Michigan’s aiding and abetting conversion statute provides:

A person damaged as a result of another person’s buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney’s fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise. [MCL 600.2919a]

This Court seeks additional argument regarding whether “constructive knowledge” may be a means by which “knowledge” may be established under MCL 600.2919a. The answer is an unqualified “yes” in this matter. As discussed below, the use of constructive knowledge is widely accepted in both the civil and criminal case law. Under such circumstances, this Court should be wary of granting leave and changing what is a bedrock of Michigan civil *and criminal* jurisprudence.

#### A. ***Michigan Courts Routinely Use Constructive Knowledge To Establish Liability Under The Criminal Counterpart To MCL 600.2919a***

It would be anomalous for this Court to reject the use of “constructive knowledge” to establish liability under MCL 600.2919a where Michigan courts routinely use constructive knowledge under the penal statutory equivalent to the civil aiding and abetting statute. In striking similarity to MCL 600.2919a, MCL 750.535 provides, in relevant part: “A person shall not buy, receive, possess, conceal,

or aid in the concealment of stolen, embezzled, or converted money, goods, or property knowing the money, goods, or property is stolen, embezzled, or converted.”<sup>1</sup>

This Court has endorsed the use of constructive knowledge in criminal convictions for receiving stolen property, stating: “Guilty knowledge means not only actual knowledge, but constructive knowledge, through notice of facts and circumstances from which guilty knowledge may fairly be inferred.” People v. Tantenella, 212 Mich. 614, 620, 180 N.W. 474 (1920). And the Michigan Court of Appeals has long followed this Court’s decision in Tantenella in affirming convictions and jury instructions allowing constructive knowledge to prove guilt. *See, e.g., People v. Gould*, 225 Mich. App. 79, 87, 570 N.W.2d 140 (1997) (“When knowledge is an element of an offense, it includes both actual and constructive knowledge”), lv. app. denied 459 Mich. 955, 590 N.W.2d 972 (1999); People v. Scott, 154 Mich. App. 615, 616, 397 N.W.2d 852 (1986) (“Guilty knowledge means not only actual knowledge, but also constructive knowledge through notice of facts and circumstances from which guilty knowledge may be inferred”).

The Court of Appeals has routinely reinforced the use of circumstantial evidence to justify the inference of a defendant’s knowledge, stating, “The circumstances accompanying the transaction may justify the inference by the jury that the defendant received the goods on belief that they were stolen.” People v.

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<sup>1</sup> Indeed, a further similarity between the two statutes can be found in the fact that MCL 750.535(2) also provides for treble damages, like MCL 600.2919a, as a fine for the unlawful conduct.

Wolak, 110 Mich. App. 628, 632, 313 N.W.2d 174 (1981); People v. Brown, 126 Mich. App. 282, 336 N.W.2d 908 (1983) (finding circumstantial evidence sufficient for jury to infer that defendant knew property was stolen); People v. Clark, 154 Mich. App. 772, 775, 397 N.W.2d 864 (1986) (“Guilty knowledge that property received or concealed was stolen can be shown by direct or circumstantial evidence”); People v. Lauzon, 84 Mich. App. 201, 269 N.W.2d 524 (1978) (“Guilty knowledge of the fact that goods were previously stolen is essential element of the crime of receiving and concealing stolen goods . . . guilty knowledge may be actual or constructive” (internal citation omitted)).

Michigan’s use of constructive knowledge is not unique. *See, e.g., Spitzer v. Commonwealth*, 233 Va. 7, 9, 353 S.E.2d 711 (1987) (holding that “guilty knowledge is an essential element of the offense [of receiving stolen goods] as defined by the statute, but absent proof of an admission against interest, such knowledge necessarily must be shown by circumstantial evidence.”); Lewis v. State, 573 So. 2d 713, 715 (Miss. 1990) (finding that if a reasonable person would know from the circumstances that the property was stolen, then the court would find the evidence sufficient to show guilty knowledge); People v. Mendoza, 18 Cal.4th 1114, 1133, 959 P.2d 735 (1998) (aiding and abetting liability is not contingent on actual knowledge that a crime will occur; the crime need only be reasonably foreseeable); People v. Juehling, 10 Cal. App. 2d 527, 531, 52 P.2d 520 (1935) (statutory requirement as to guilty knowledge may be met by admissible evidence from which the element of guilty knowledge properly may be inferred); Commonwealth v. White, 233 Pa.

Super. 195, 334 A.2d 757 (1975) (holding that the element of defendant's guilty knowledge may be established by direct evidence of knowledge or by circumstantial evidence from which it can be inferred that he had reasonable cause to know that the property was stolen).

In the case at bar, there is ample evidence, as discussed in Echelon's brief in response to Carter Lumber's application for leave to appeal, for a jury to infer that Carter Lumber had knowledge of Wood's embezzlement and theft based on the existing circumstances. As in any criminal case, this evidence can be used to establish "knowledge" for purposes of violating MCL 600.2919a. The use of evidence under such circumstances is not novel or unique and does not warrant this Court's review of a well established legal principle.

Again, it would be anomalous to allow constructive knowledge to establish criminal liability with its attendant consequences, yet prohibit it in the civil context.

***B. Courts Routinely Use Constructive Knowledge To Establish Liability In Civil Cases***

Using constructive knowledge is also a common practice in civil tort law in Michigan. Indeed, this Court has endorsed the use of constructive knowledge on many occasions. See York v. City of Detroit, 438 Mich. 744, 475 N.W.2d 346 (1991) (deliberate indifference in civil rights case could be proven by actual or constructive knowledge); Peters v. State, 400 Mich. 50, 63-64, 252 N.W.2d 799 (1977) (finding that sufficient evidence existed to conclude that State had at least constructive knowledge of defective condition to impose liability); Bradley v. Burdick Hotel, 306

Mich. 600, 603, 11 N.W.2d 257 (1943) (property owner can be held liable where it had constructive notice of dangerous condition).

Other jurisdictions also allow the use of circumstantial evidence to prove knowledge, particularly when the defendant is the beneficiary of the underlying illegal activity. See Gould v. American-Hawaiian S.S. Co., 535 F.2d 761, 779-780 (3rd Cir. 1976) citing Northway, Inc. v. TSC Industries, Inc., 512 F.2d 324, 339 (7th Cir. 1975) (stating that the requirement of knowledge may be less strict where the alleged aider and abettor derives benefits from the wrongdoing but that the proof must establish conscious involvement in impropriety *or* constructive notice of intended impropriety (emphasis added)); HBE Leasing Corp. v. Frank, 48 F.3d 623, 636 (2d Cir. 1995) (constructive knowledge of fraudulent schemes will be attributed to transferees who were aware of circumstances that should have led them to inquire further into the circumstances of the transaction, but who failed to make such inquiry, where lenders "knew, or should have known" that monies would not be retained by debtor).

Courts in other jurisdictions have also found that the issue of constructive knowledge is a question for the jury, an issue upon which summary judgment may not be granted. See Robertson v. Seidman & Seidman, 609 R.2d 583, 591 (2d Cir. 1978) ("Issues of due diligence and constructive knowledge depend on inferences drawn from the facts of each case. When conflicting inferences can be drawn from the facts, the question is one for the jury").

There is little importance in the issue presented to warrant the Court's grant of leave in this matter where the Court of Appeals simply followed long established principles.

***C. Willful Blindness Is A Well Established Mechanism To Establish Knowledge***

The use of willful blindness to establish civil liability is well recognized in Michigan. In Hudson v. O&A Electric Co-Operative, 332 Mich. 713, 52 N.W.2d 565 (1952), this Court acknowledged that a company may not close its eyes to the facts before it and expect to avoid being charged with knowledge of the very facts so ignored:

A person is chargeable with constructive notice when, having the means of knowledge, he does not use them. If he has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries and does not make, but studiously avoids making, the obvious inquiries, he must be taken to have notice of those facts which, had he used ordinary diligence, would have been readily ascertained. [*Id.* at p. 716.]

Michigan lower courts have continued to properly apply the holding in Hudson. For example, in Thomas Estate v. Manufacturers Nat'l Bank of Detroit, 211 Mich. App. 594, 601, 536 N.W.2d 579 (1995), the Court of Appeals held that "[k]nowledge of facts putting a person of ordinary prudence on inquiry is equivalent to actual knowledge of the facts which a reasonably diligent inquiry would have disclosed." In Thomas Estate, the defendant bank was in possession of a document that, if reviewed, would have provided it with the information it claimed not to possess. The court found that the failure to conduct a reasonable diligent inquiry

was no excuse for the bank's actions, and the bank was found to have knowledge of the relevant information. *See also* United States v. Hoffman, 918 F.2d 44, 46-47 (6th Cir. 1990) ("A defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact."); and United States v. Williams, 195 F.3d 823, 826 (6th Cir. 1999) (stating "the jury could have found that appellant was ignorant, but that his ignorance resulted from willful blindness. Consequently, there was sufficient evidence to conclude that appellant had the requisite state of mind").

The use of the willful blindness or "inquiry notice" concept is not limited to Michigan. In Aetna Casualty, 219 F.3d at 536, the federal Sixth Circuit affirmed a judgment against a bank for aiding and abetting tortious conduct where the bank provided a loan under unusual circumstances and the loan was used as mechanism for fraud. In doing so, the Sixth Circuit stated:

A bank, however, is not immune from civil aiding and abetting claims, and to the extent that its knowledge of the primary party's tortious conduct can be proven, **either by direct or circumstantial evidence**, liability will attach if the other elements are present. [219 F.3d at 536. Emphasis added.]

Willful blindness also has its place in criminal law. Indeed, forfeiture can occur in both criminal and *in rem* proceedings where property owners turn a blind eye to illegal conduct. *See* U.S. v. Prince, 214 F.3d 740, 760 (6th Cir. 2000) (In addressing convictions for various fraud and aiding and abetting charges: "We found no error in the instruction that 'a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact'"); U.S. v. One 1988

Honda Accord, 735 F.Supp. 726, 729-30 (E.D. Mich. 1990) (willful blindness resulted in forfeiture); *see also* U.S. v. Williams, 195 F.3d 823, 825-26 (6th Cir. 1999) (using willful blindness involving illegal disposal of hazardous waste). In sum, as the Sixth Circuit stated 30 years ago: "Construing 'knowingly' in a criminal statute to include wilful blindness to the existence of a fact is no radical concept in the law." U.S. v. Thomas, 484 F.2d 909, 913 (6th Cir. 1973). There is also nothing radical about applying this concept today in a civil case and, in particular, to the facts of this case.

Other jurisdictions have applied the doctrine of willful blindness or deliberate ignorance in both civil and criminal cases to impute knowledge to a party who should know of a high probability of illegal conduct and purposely contrives to avoid learning of it. In Leary v. United States, 89 S. Ct. 1532 (1969), the United States Supreme Court cited favorable the Model Penal Code's "knowledge" definition which incorporates imputed knowledge as a method of proving knowledge under a criminal statute. Indeed, a defendant can also be said to know a fact if he "is aware of a high probability of its existence, unless he actually believes that it does not exist." Leary at 46 n.93.

The Ninth Circuit later addressed the Model Penal Code and held that:

the substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable. The textual justification is that in common understanding one "knows" facts of which he is less than absolutely certain. To act "knowingly," therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When

such awareness is present, "positive" knowledge is not required.  
[United States v. Jewell, 532 F. 2d 697, 700 (9th Cir. 1976)]

Other federal circuit courts have concurred:

- United States v. Florez, 368 F.3d 1042, 1044-1045 (8th Cir. 2004):  
where the government had to prove that the defendant knew that a financial transaction involved proceeds from "some form of unlawful activity, . . . the evidence taken as a whole was sufficient to support an inference that even if [defendant] did not have actual knowledge [that the account was being used] for illegal activities, it was only because she chose not to investigate and effectively buried her head in the sand."
- United States v. Schnabel, 939 F.2d 197, 203 (4th Cir. 1991): "willful blindness is a form of constructive knowledge that allows the jury to impute the element of knowledge to the defendant if the evidence indicates that he purposely closed his eyes to avoid knowing what was taking place around him."
- United States v. Sharpe, 193 F.3d 852, 871 (5th Cir. 1999): evidence was sufficient to support deliberate ignorance instruction where the defendant knew of the high probability of illegal conduct and purposely contrived to avoid learning about it.

- United States v. Rodriguez, 53 F.3d 1439, 1447 (7th Cir. 1995): “It is well settled that willful blindness . . . is the legal equivalent to knowledge.” (internal quotation marks and citations omitted).
- United States v. Gruenberg, 989 F.2d 971, 974 (8th Cir. 1998): finding a willful blindness instruction is proper where evidence supports an inference of “deliberate ignorance.”
- United States v. Perez-Tosta, 36 F.3d 1552, 1564 (11th Cir. 1994) (“A ‘deliberate ignorance’ instruction is appropriate when ‘the facts . . . support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution.’” *quoting* United States v. Rivera, 944 F.2d 1563, 1571 (11th Cir. 1991)).

The concept of willful blindness has also been applied in many other areas, including (1) commodities cases, *see, e.g.*, CFTC v. Sidoti, 178 F.3d 1132, 1136-37 (11th Cir. 1999) (“the element of knowledge may be inferred from deliberate acts amounting to willful blindness to the existence of fact or acts constituting conscious purpose to avoid enlightenment”), (2) medicare fraud cases, *see, e.g.*, United States v. Baxter Int’l, Inc., 345 F.3d 866, 902-903 (11th Cir. 2003) (finding that the government had sufficiently alleged that defendants structured a settlement in a manner so as to avoid learning any identifying information about the class members, including their Medicare eligibility), and (3) copyright actions, *see, e.g.*, In

re Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003) (“Willful blindness is knowledge, in copyright law, where indeed it may be enough that the defendant should have known of the direct infringement”).

This Court should decline to grant leave on the willful blindness issue where the Court of Appeals’ opinion is consistent with established civil and criminal precedents in Michigan and other jurisdictions. Indeed, the novel result would be to overturn this well established policy.

***D. The Legislature’s Use Of “Knowledge” Without The Modifier “Actual” Knowledge Suggests The Use Of Constructive Knowledge May Be Used To Impose Liability***

As discussed above, this Court has routinely allowed constructive knowledge to be used where a statute refers to knowledge. This Court has deviated from that position where the legislature passed a statute expressly calling for “actual knowledge.”

For example, in Travis v. Dreis & Krump Mfg. Co., 453 Mich. 149, 551 N.W.2d 132 (1996), this Court reviewed whether constructive knowledge could be used to establish employer liability under the worker’s compensation act which specifically used the words “actual knowledge.” In construing that statutory language, this Court stated:

Because the Legislature was careful to use the term ‘actual knowledge,’ and not the less specific word ‘knowledge,’ we determine that the Legislature meant that constructive, implied, or imputed knowledge is not enough. Nor is it sufficient to allege that the employer should have known, or had reason to believe, that injury was certain to occur. A plaintiff may establish a

corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do." [453 Mich. at 173-174. Citations omitted.]

By contrast here, the legislature did use the more general "knowledge" language without the "actual" knowledge modifier. Here, had the legislature desired a different result, it could have amended or added language to MCL 600.2919a requiring "actual" knowledge as it did in the workers' compensation setting. Having left out the modifier, the legislature must have intended that constructive knowledge may be used to prove knowledge under the aiding and abetting statute.

#### CONCLUSION

For the reasons stated above, this Court should deny leave to appeal in this matter as the Court of Appeals correctly held that constructive knowledge may be used to establish that a party aided and abetted conversion under MCL 600.2919a.

Respectfully submitted,

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